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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protests of  
VALLEJO CJD, LLC, a California Limited  
Liability Company,

Protestant,

v.

FCA US LLC, a Delaware Limited Liability  
Company,

Respondent.

In the Matter of the Protests of  
FAIRFIELD CJD, LP, a California Limited  
Partnership,

Protestant,

v.

FCA US LLC,

Respondent.

**Protest Nos. PR-2589-18, PR-2590-18,  
PR-2591-18, PR-2592-18**

**MOTION TO DISMISS PROTESTS  
OR, IN THE ALTERNATIVE, FOR A  
FINDING OF GOOD CAUSE TO  
TERMINATE BASED ON  
UNCONTESTED EVIDENCE**

**Protest Nos. PR-2593-18, PR-2594-18,  
PR-2595-18, PR-2596-18**

1 Robert E. Davies and Mary A. Stewart of the law firm of Donahue Davies LLP, Post Office  
2 Box 277010, Sacramento, California 95827, and Roger H. Stetson, Jack O. Snyder, Jr., and David B.  
3 Lurie of the law firm Barack Ferrazzano Kirschbaum & Nagelberg LLP, 200 West Madison Street,  
4 Suite 3900, Chicago, Illinois 60606, hereby move to dismiss the above-captioned Protests on behalf of  
5 Respondent FCA US LLC ("FCA US"), or in the alternative, for a finding that FCA US has good  
6 cause to terminate its Dealer Agreements with Vallejo CJD LLC d/b/a Momentum Chrysler Dodge Jeep  
7 RAM of Vallejo ("Momentum Vallejo") and Fairfield CJD, LP d/b/a Momentum Chrysler Dodge Jeep  
8 RAM of Fairfield ("Momentum Fairfield"; collectively, "Momentum") based on uncontested facts.  
9

### 10 INTRODUCTION

11 1. Momentum filed the Protests more than ten days after its receipt of the Notices of  
12 Termination. The Protests are therefore untimely under the California Vehicle Code, and this Board  
13 does not have jurisdiction to hear them.

14 2. Furthermore, Momentum purports to protest the Notices of Termination even though it is  
15 not currently operating any Chrysler, Dodge, Jeep, and/or RAM ("CDJR") dealership in California, and  
16 indeed has no intention of doing so. The Momentum dealerships in Vallejo and Fairfield went out of  
17 business no later than November 16, 2018, have no valid dealer licenses or floor plan financing, and  
18 potentially face tens of millions of dollars in debt to their creditors—including their floor plan lender.  
19 As a result of Momentum's total financial collapse, many of the dealerships' assets are in receivership  
20 and subject to liquidation. This situation is also incurable, as Momentum has conceded by agreeing to  
21 the receivership and requesting a coordinated sale of the dealerships in a "package" with other non-  
22 CDJR Momentum dealerships. As the uncontested facts demonstrate, no decision of this Board could  
23 possibly restore Momentum's CDJR dealership operations, so these Protests are moot.

24 3. For the same reasons, the uncontested facts demonstrate that FCA US has good cause to  
25 terminate Momentum Vallejo and Momentum Fairfield. FCA US is therefore entitled to dismissal and a  
26 finding that FCA US may terminate the Momentum Dealer Agreements, based on (1) the untimeliness  
27 of these Protests, (2) mootness, and (3) the existence of good cause for FCA US to terminate.  
28

1 **PARTIES**

2 4. FCA US manufactures and distributes CDJR vehicles and is a party to each of the  
3 Chrysler, Dodge, Jeep, and RAM Dealer Agreements with Momentum Vallejo and Momentum Fairfield  
4 (the "Dealer Agreements").

5 5. Momentum Vallejo is a new and used motor vehicle dealer, and formerly sold CDJR  
6 vehicles and parts from a dealership facility located at 1001 Admiral Callaghan Lane, Vallejo, CA  
7 94591, and displayed vehicles from a RAM Truck Center located at 4345 Sonoma Blvd., Vallejo, CA  
8 94591 (collectively, the "Vallejo Dealership Premises").

9 6. Momentum Fairfield is a new and used motor vehicle dealer, and formerly sold CDJR  
10 vehicles and parts from a dealership facility located at 2595 Auto Mall Parkway, Fairfield, CA 94533  
11 (the "Fairfield Dealership Premises").

12 **STATEMENT OF FACTS**

13 7. On November 30, 2018, pursuant to California Vehicle Code § 3060, FCA US sent  
14 fifteen-day Notices of Termination to Momentum Vallejo and Momentum Fairfield for the CDJR  
15 vehicle lines, based on two grounds: (1) Momentum's failure to conduct dealership operations for seven  
16 consecutive business days, and (2) the dealerships' insolvency and the appointment of a *de facto*  
17 receiver to oversee Momentum's assets.

18 8. The Notices of Termination identified each of the foregoing as a violation of the Dealer  
19 Agreements, described each violation as incurable, and stated that FCA US has good cause under  
20 California law to terminate the Dealer Agreements.

21 9. The Notices of Termination supported the grounds for termination with substantial  
22 documentary evidence. This evidence includes (1) a declaration from Eric Wong, an FCA US employee  
23 responsible for oversight of Momentum Vallejo and Momentum Fairfield, attesting to the lack of  
24 dealership activity since at least November 16, 2018; (2) letters from the dealerships' floor plan lender,  
25 notifying FCA US that the dealerships' floor plan financing was suspended as of November 2, 2018;  
26 (3) court records demonstrating that Momentum, as well as its President and owner Rahim Hassanally,  
27 have exposed themselves to tens of millions of dollars in delinquent debt, resulting in lawsuits by  
28 creditors, a temporary restraining order against transfer of Momentum's inventory and assets, and

1 appointment of a *de facto* receiver for certain of Momentum's assets; (4) court records demonstrating  
2 that Momentum itself has argued that receivership is necessary, and effectively conceded that it has  
3 become insolvent; and (5) files from the California Department of Motor Vehicles ("DMV") showing  
4 Momentum's loss of its dealer licenses. Based on this evidence, as indicated above, FCA US stated its  
5 conclusion that there was no prospect of the Momentum dealerships reopening.

6 10. FCA US sent the Notices of Termination for Momentum Vallejo and Momentum  
7 Fairfield to their respective mailing addresses. FCA US also sent each of the Notices of Termination to  
8 the Board, Mr. Hassanally's home address, and the office of Christian Scali, Momentum's agent for  
9 service of process. (See California Secretary of State filings, attached hereto as **Exhibit 1.**)

10 11. USPS confirms that the Notices of Termination were delivered to the Board and Mr.  
11 Scali's office on December 3, 2018, and to both dealerships' mailing addresses the following day. Each  
12 delivery was signed for at the time of receipt. (See USPS delivery confirmations, attached hereto as  
13 **Exhibit 2.**)

14 12. On December 18, 2018, fifteen calendar days after receiving the Notices of Termination,  
15 Momentum filed the instant Protests. The Protests do not plead any facts to contest FCA US's evidence  
16 that Momentum Vallejo and Momentum Fairfield have been closed for more than seven consecutive  
17 business days, and that they have become insolvent and subject to management by a receiver. Instead,  
18 the Protests recite the "good cause" factors set forth in California Vehicle Code § 3061, and state a  
19 general denial of the matters set forth in the Notices of Termination. (PR-2589-18 at ¶ 11; PR-2590-18  
20 at ¶ 11; PR-2591-18 at ¶ 11; PR-2592-18 at ¶ 11; PR-2593-18 at ¶ 11; PR-2594-18 at ¶ 11; PR-2595-18  
21 at ¶ 11; PR-2596-18 at ¶ 11.)

22 13. The Protests also recite several vague and unsubstantiated claims that FCA US "breached  
23 the franchise," including by "unfairly competing" with Momentum, "refus[ing] to recognize and treat  
24 [Momentum]" as CDJR dealerships, notifying customers that Momentum is no longer a CDJR dealer,  
25 and generally acting "in contravention of applicable law." (PR-2589-18 at ¶ 11(f); PR-2590-18 at  
26 ¶ 11(f); PR-2591-18 at ¶ 11(f); PR-2592-18 at ¶ 11(f); PR-2593-18 at ¶ 11(f); PR-2594-18 at ¶ 11(f);  
27 PR-2595-18 at ¶ 11(f); PR-2596-18 at ¶ 11(f).) Notably, these allegations were copied nearly verbatim  
28 from the termination protests recently filed by several other dealerships under Mr. Hassanally's control

(the “non-CDJR Momentum dealerships”). (See, e.g., Protest Nos. PR-2579-18 at ¶ 11(f) (Toyota); PR-2581-18 at ¶ 10(f) (Volkswagen); PR-2582-18 at ¶ 10(f) (Hyundai)).

14. As of the date of this filing, Momentum has been closed for over a month and a half. (See Declaration of Eric Wong (“Wong Decl.”), attached hereto as Exhibit 3, at ¶ 40; Supplemental Declaration of Eric Wong (“Wong Supp. Decl.”), attached hereto as Exhibit 4, at ¶ 14.)

15. Momentum has also had no floor plan financing since at least November 2, 2018. On that date, Momentum’s floor plan lender, BBVA Compass, notified FCA US in letters (attached hereto as Exhibit 5) that it had placed both Momentum dealerships on financing hold. Momentum does not, and cannot, allege that this financing hold has been—or will soon be—lifted.

16. On November 8, 2018, BBVA Compass sued Momentum and several other non-CDJR Momentum dealerships, as demonstrated by the complaint (“BBVA Compass Complaint,” attached hereto as Exhibit 6) filed in the matter of *Compass Bank v. Fairfield CJD, LP, et al.*, Case No. FCS051828 (Cal. Super. Ct., Solano Cnty.) (“BBVA Compass Case”). BBVA Compass claims breaches of Momentum’s floor plan agreements, the “wide-spread practice of selling vehicles out of trust,” and other causes of action. The BBVA Compass Complaint seeks more than \$36 million in damages, and also seeks to foreclose on both Momentum Vallejo and Momentum Fairfield. Moreover, the complaint also seeks to recover from Mr. Hassanally personally as a guarantor of the loan.

17. On November 14, 2018, the court in the BBVA Compass Case granted BBVA Compass a temporary restraining order (the “TRO Order,” attached hereto as Exhibit 7), which prohibited Momentum from selling its vehicle inventory or transferring funds and other collateral until at least December 5, 2018. The TRO Order also appointed an accountant to administer and account for \$522,133 of the Momentum dealerships’ funds, “for purposes of paying wages due and owing through 11/15/18 at 5pm.” (See *id.*)

18. On December 6, 2018, the court entered an Order for Preliminary Injunction and Appointment of Receiver *Pendente Lite* (the “Receivership Order,” attached hereto as Exhibit 8), appointing a receiver pursuant to Cal. Code of Civ. Proc. §§ 564, *et seq.*, to “take charge of, manage and preserve” many of Momentum’s assets, including its new vehicle inventory, and also to take possession (though not title) of the Vallejo and Fairfield Dealership Premises. (Ex. 8 at 6.) The Receivership

1 Order allows the receiver to “immediately seek to liquidate” enumerated vehicles in Momentum  
2 Vallejo’s inventory. (*Id.* at 9.) Momentum agreed to the appointment of a receiver, and did not oppose  
3 BBVA Compass’s request to liquidate the identified vehicles. (*Id.* at 3.)

4 19. The Order also entered a preliminary injunction, extending the TRO Order and requiring  
5 Momentum to “immediately surrender possession” of the Vallejo and Fairfield Dealership Premises and  
6 many of the dealerships’ assets. (*Id.* at 9-10.)

7 20. Momentum has also been sued by BMO Harris Bank N.A. (“BMO Harris”) and Toyota  
8 Motor Credit Corporation (“Toyota Motor Credit”) for breach of loan agreements and related contracts  
9 for floor plan financing at certain non-CDJR Momentum dealerships. BMO Harris seeks over \$16  
10 million in damages and alleges the sale of vehicles out of trust, as demonstrated by the complaint filed  
11 on November 6, 2018, in the matter of *BMO Harris Bank N.A. v. Maverick Auto Group 2, LLC, et al.*  
12 (“BMO Harris Case”), Case No. FCS051806 (Cal. Super. Ct., Solano Cnty.) (“BMO Harris Complaint,”  
13 attached hereto as Exhibit 9). Toyota Motor Credit seeks over \$10 million in damages against  
14 Momentum Vallejo (though not Momentum Fairfield), Mr. Hassanally, and non-CDJR Momentum  
15 dealerships, as demonstrated by the complaint filed on November 21, 2018, in the matter of *Toyota*  
16 *Motor Credit Corp. v. Fairfield Imports, LLC, et al.* (“Toyota Motor Credit Case”), Case No.  
17 FCS051912 (Cal. Super. Ct., Solano Cnty.) (“Toyota Motor Credit Complaint,” attached hereto, without  
18 its voluminous exhibits, as Exhibit 10). Based on documents attached to each complaint, it appears that  
19 Momentum has executed agreements exposing itself to liability under the loan agreements and related  
20 contracts, even though neither BMO Harris nor Toyota Motor Credit is Momentum’s CDJR floor plan  
21 lender.

22 21. In the BMO Harris Case, Momentum and related non-CDJR dealerships filed a cross-  
23 complaint (attached hereto as Exhibit 11) on November 16, 2018, seeking appointment of a receiver to  
24 sell all of the dealerships’ assets “in one global transaction.” (*Id.* at 4.)

25 22. As shown by the Declaration of Eric Wong and associated exhibits, Momentum Vallejo  
26 has not reported the delivery of a new CDJR vehicle since November 7, 2018, has not processed any  
27 delivery reporting since November 12, 2018, and has not ordered a CDJR vehicle since  
28 September 4, 2018. (Wong Decl., Ex. 3, at ¶ 39; Wong Supp. Decl., Ex. 4, at ¶ 13.) Momentum

1 Fairfield has not reported the delivery of a new CDJR vehicle since November 12, 2018, has not  
2 processed any delivery reporting since November 14, 2018, and has not ordered a CDJR vehicle since  
3 September 12, 2018. (*Id.* at ¶ 39; Wong Supp. Decl., Ex. 4, at ¶ 13.)

4 23. Momentum has no dealership operations, faces tens of millions of dollars in debt, and is  
5 unable to operate as a new motor vehicle dealer in the State of California. Mr. Wong has also stated his  
6 informed belief, based on his review of Momentum's operations and financial status, that Momentum  
7 has gone permanently out of business. (Wong Decl., Ex. 3, at ¶ 42; Wong Supp. Decl., Ex. 4, at ¶ 15.)

8 24. All or nearly all of the non-CDJR Momentum dealerships also closed in November 2018.  
9 (See news reports documenting the closures, attached hereto as Exhibit 12; Wong Decl., Ex. 3, at ¶¶ 22,  
10 24, 32, 41; Wong Supp. Decl., Ex. 4, at ¶ 12; *see also* Michael Finney, *Latest on Momentum Auto Group*  
11 *and Advice for Customers*, ABC7 NEWS (Jan. 8, 2019, 9:26 PM), [https://abc7news.com/business/latest-](https://abc7news.com/business/latest-on-momentum-auto-group-and-advice-for-customers/5035857/)  
12 [on-momentum-auto-group-and-advice-for-customers/5035857/](https://perma.cc/TCS9-QVWT) [<https://perma.cc/TCS9-QVWT>] (local  
13 news segment supporting the observations of Eric Wong regarding the Momentum dealership closures)).

14 25. No later than November 21, 2018, the DMV recognized that Momentum had closed, and  
15 therefore listed—and continues to list—both dealerships' licenses as "Not Valid." (See Exhibit 13.)  
16 Momentum's loss of its licenses leaves it legally unable to operate a new motor vehicle dealership in  
17 California. See Cal. Veh. Code § 11700 (requiring a license for dealer operations); *id.* at § 11713.3(q)  
18 (making it illegal for a manufacturer to "sell vehicles to a person not licensed pursuant to this chapter for  
19 resale").

#### 20 LEGAL STANDARD

21 26. The Board may dismiss a franchisee's protest at any stage, "for good cause shown."  
22 13 Cal. Code Regs. § 551.8(c); *Duarte & Witting, Inc. v. New Motor Vehicle Bd.*, 104 Cal. App. 4th 626,  
23 637 (2002). A motion to dismiss a protest may be presented and considered in a manner "analogous to a  
24 summary judgment motion," *id.*, and may include consideration of evidence beyond what is typically  
25 associated with a "motion to dismiss" in state or federal courts. See *Auto. Mgmt. Grp., Inc. v. New*  
26 *Motor Vehicle Bd.*, 20 Cal. App. 4th 1002, 1012 (1993) (affirming use of exhibits on a motion to dismiss  
27 a termination protest); *cf.* Fed. R. Civ. Pro. 12(d). The Board must dismiss any protest filed more than  
28 ten calendar days after the franchisee's receipt of a fifteen-day notice of termination. See *Sonoma*

1 *Subaru, Inc. v. New Motor Vehicle Bd.*, 189 Cal. App. 3d 13, 22 (1987) (citing Cal. Veh. Code § 3060).  
2 The Board also has authority to dismiss a protest “where the undisputed facts demonstrate good cause  
3 for franchise termination as a matter of law and afford no basis for preventing termination of the  
4 franchise.” *Duarte*, 104 Cal. App. 4th at 637.

## 5 ARGUMENT

### 6 A. Momentum Vallejo’s Protest Is Untimely.

7 27. Under California Vehicle Code § 3060(a), a franchisee must file its protest with the board  
8 within 10 calendar days after receiving a 15-day Notice of Termination or within 10 days after the end  
9 of any appeal procedure provided by the franchisor, or the franchisee’s protest right will be waived. If  
10 the franchisee does not file a protest within that ten-day window, the Notice of Termination becomes  
11 effective fifteen days after the franchisee receives it. *See Sonoma Subaru, Inc.*, 189 Cal. App. 3d at 21.

12 28. This ten-day protest window does not allow for exceptions—even where the franchisee  
13 has “good cause” for its tardiness. As the court in *Sonoma Subaru* explained:

14 Where no protest of the termination is filed within the allotted time, the  
15 Legislature’s obvious intent is to let the franchisor treat the termination as  
16 final and effective. . . . Sanctioning late filings would undercut that  
17 finality and create uncertainty in the minds of franchisors as to whether  
they may treat their relationship with unsatisfactory franchisees as  
concluded.

18 *Id.* at 22. The Board has likewise recognized that “[t]he deadline for filing a protest is jurisdictional and  
19 must be applied regardless of the reason for the late filing.” *Calabasas Euro Auto Grp., LLC v.*  
20 *Automobili Lamborghini, S.p.A*, Protest No. PR-2174-09, at ¶ 84 (N.M.V.B. Dec. 10, 2009) (Decision).

21 29. Momentum received the Notices of Termination on December 3, 2018. On that date,  
22 USPS delivered the Notices—via Priority Mail Express—to the office of Christian Scali, Momentum’s  
23 agent for service of process. (*See Ex. 1; Ex. 2.*) The next day, USPS also delivered the Notices of  
24 Termination for Momentum Vallejo and Momentum Fairfield, respectively, to each dealership’s mailing  
25 address. (*See Ex. 2.*)

26 30. Under Section 3060, Momentum was obliged to file protests no later than  
27 December 13, 2018. Consistent with the statute, the Notices of Termination advised Momentum of this  
28 ten-calendar-day window. Nonetheless, Momentum failed to file any protests until December 18, 2018,



1 fifteen calendar days after receiving the Notices of Termination (and fourteen calendar days after the  
2 Notices of Termination were received and signed for at Momentum's mailing addresses). Because  
3 Momentum failed to timely protest the Notices of Termination, it forfeited its protest rights. These  
4 untimely Protests are therefore outside the Board's jurisdiction, and must be dismissed.

5 **B. Momentum Admits It Cannot Resume Dealership Operations, So these Protests Are Moot.**

6 31. Although it is FCA US's position that the Board lacks jurisdiction to hear the Protests,  
7 even if the Protests were timely, the Board should dismiss them as moot. No remedy within the Board's  
8 power can restore Momentum's dealership operations. Momentum Vallejo and Momentum Fairfield are  
9 not operating as motor vehicle dealers in the state of California, have become insolvent, are subject to  
10 indefinite management by a receiver, and have neither the ability nor even the desire to resume  
11 operations. The dealerships, in short, have gone out of business.

12 32. This Board recently dismissed a similar protest in *Porter Auto Grp., L.P. v. FCA US LLC*,  
13 Protest No. PR-2534-17 (N.M.V.B. July 3, 2018) (Decision). In *Porter*, as here, the franchisee protested  
14 FCA US's notices of termination, even though the dealership had gone out of business and faced  
15 millions of dollars in potential legal liability. *See id.* at ¶ 10. The franchisee did not dispute FCA US's  
16 voluminous evidence in support of its grounds for termination, instead contending that it was entitled to  
17 a hearing as a matter of course, and also alleging—without support or detail—that it had prospects for an  
18 infusion of capital to pay off its debts. *See id.* at ¶¶ 18-19.

19 33. In *Porter*, Judge Skrocki recommended the dismissal of the protest as moot, and the  
20 Board adopted that recommendation. Judge Skrocki reasoned that, because the dealership could not  
21 reopen, there was no available remedy:

22 The purpose of Section 3060 is to protect franchisees from unjustified  
23 terminations of franchises that would result in the loss of the dealerships  
24 and loss of the investment of the owners as well as to protect the public's  
25 access to dealerships . . . . Ordinarily, the dealership is in operation but  
26 will be required to cease operation if the franchise is terminated. Here, the  
27 situation is reversed. Although the franchises, the written agreements,  
28 technically continue to exist, it is the dealership that has already been lost  
and all of the adverse consequences that would flow from such a loss or  
closure have already occurred and cannot be remedied or ameliorated by  
any order of the Board that FCA [US] should not be permitted to terminate  
the written agreements.

1 *Id.* at ¶ 42; *see also Duarte*, 104 Cal. App. 4th at 642 (holding that a franchisee’s reliance on “good  
2 cause” factors could not prevent dismissal where the franchisor validly discontinued the vehicle line at  
3 issue, “rendering moot such issues as whether the franchisee has complied with its obligations”);  
4 *Schoshinski v. City of Los Angeles*, 9 Cal. App. 5th 780, 791 (2017) (“If events have made [the  
5 requested] relief impracticable, the controversy has become ‘overripe’ and is therefore moot.”) (citations  
6 omitted), *reh’g denied* (Apr. 3, 2017), *review denied* (June 28, 2017).

7 34. The Board’s decision in *Mega RV Corp. d/b/a McMahons RV v. Roadtrek Motorhomes*,  
8 *Inc.*, Protest No. PR-2245-10 (N.M.V.B. Aug. 23, 2012) (Decision), is also directly on point. In  
9 *Roadtrek*, the franchisee attempted to protest a notice of termination even though the dealership was  
10 closed and it “appear[ed] that there [was] little or no likelihood that the . . . dealership could re-open at  
11 that location.” *Id.* at ¶ 18. Judge Skrocki dismissed the protest, reasoning that “there is no need to apply  
12 the good cause factors” in Section 3061, because a “[d]ecision of the Board that sustains the protest and  
13 concludes that [the franchisor] may not terminate the franchise . . . is meaningless as to the practical  
14 considerations called for in the statutory scheme.” *Id.* at ¶ 63.

15 35. Additionally, the *Porter* protest involved a dealer who at least *alleged* that it planned to  
16 reopen. By contrast, Momentum has recognized that a “coordinated sale of all Momentum dealerships”  
17 is necessary to pay off its debts. (*See Cross-Complaint*, Ex. 11, at ¶ 19.) Indeed, with Momentum’s  
18 consent, the court in the BBVA Compass case has appointed a receiver to liquidate many of  
19 Momentum’s assets, including its CDJR new vehicle inventory. (*See Receivership Order*, Ex. 8, at 6-8.)

20 36. Because Momentum does not even claim the *desire*—much less the capacity—to reopen  
21 its dealerships, “there would be no point to conducting an evidentiary hearing on issues of whether the  
22 dealer was performing its obligations under the franchise agreement. Such an evidentiary hearing would  
23 simply entail the wasteful expenditure of public funds.” *Duarte*, 104 Cal. App. 4th at 637; *see also*  
24 *Roadtrek*, Protest No. PR-2245-10, at ¶ 65 (“[T]he Board cannot by its Decision prevent the closure that  
25 has already occurred or order that the dealership be re-opened, [so] logic dictates that there is no reason  
26 to further consider whether [the franchisor] has good cause for the occurrence of an event which has  
27 already occurred (the closure of the . . . dealership).”)

1           37. In sum, no relief this Board might provide could possibly reverse Momentum's financial  
2 collapse, cause the dealerships to reopen, resolve any encumbrances on its vehicles and other assets,  
3 restore its licenses, or reverse the appointment of a receiver. Momentum's Protests are therefore moot,  
4 and must be dismissed.

5           **C. The Uncontested Facts Demonstrate Good Cause to Terminate as a Matter of Law.**

6           38. Because these protests are moot, the Board need not assess whether FCA US has "good  
7 cause" to terminate Momentum under § 3061. But to the extent that such an assessment were deemed  
8 necessary, the undisputed facts plainly show that FCA US has good cause to terminate as a matter of  
9 law.

10          39. The Board is empowered to find good cause as a matter of law on a motion to dismiss.  
11 *Duarte*, 104 Cal. App. 4th at 629 ("[T]he Board has implied authority to dismiss a protest where, as in  
12 this case, the undisputed facts show good cause for termination of a franchise.").

13          40. In *Porter*, the Board held that *Duarte* extends to a shuttered dealership, reasoning that,  
14 because the "likelihood of [the dealership] ever being able to reopen its dealership [was] so remote as to  
15 be deemed impossible," each of the "good cause" factors was met as a matter of law. Protest No. PR-  
16 2534-17 at ¶¶ 52, 63.

17          41. Here, as in *Duarte* and *Porter*, Momentum's circumstances demonstrate that FCA US has  
18 good cause for termination *as a matter of law*, and that allowing Momentum an evidentiary hearing on  
19 each factor "would simply entail the wasteful expenditure of public funds." *Duarte*, 104 Cal. App. 4th  
20 at 637; *see also* Cal. Veh. Code § 3061 (allowing the Board "take into consideration the existing  
21 circumstances" as a whole); *Porter*, Protest No. PR-2534-17, at ¶ 50 (reasoning that the "most important  
22 'existing circumstances'" included the franchisee's insolvency and loss of its dealership, license, and  
23 employees).

24          42. Under § 3060, a manufacturer may terminate a franchise on fifteen days' notice based on  
25 the "[f]ailure of the motor vehicle dealer to conduct its customary sales and service operations during its  
26 customary hours of business for seven consecutive business days, giving rise to a good faith belief on  
27 the part of the franchisor that the motor vehicle dealer is in fact going out of business, except for  
28

1 circumstances beyond the direct control of the motor vehicle dealer or by order of the department.” Cal.  
2 Veh. Code § 3060(a)(1)(B)(v).

3 43. It is undisputed that Momentum has not conducted *any* CDJR sales or service operations  
4 for at least a month and a half. (See Wong Decl., Ex. 3, at ¶¶ 39-40; Wong Supp. Decl., Ex. 4, at ¶¶ 13-  
5 14.) Momentum’s closure and the surrounding circumstances have given rise to a good faith belief on  
6 the part of FCA US that Momentum is in fact going out of business. These circumstances include,  
7 among other things, Momentum’s inability to pay its debts, its consent to subject its assets to  
8 receivership, and the entry of a preliminary injunction requiring Momentum to surrender possession of  
9 its CDJR assets and the Dealership Premises.

10 44. Section 3060 also allows a manufacturer to terminate a franchise on fifteen days’ notice  
11 based on the “[i]nsolvency of the franchisee, or filing of any petition by or against the franchisee under  
12 any bankruptcy or receivership law.” Cal. Veh. Code § 3060(a)(1)(B)(iii). As the court in the BBVA  
13 Compass Case recognized, Momentum and the non-CDJR Momentum dealerships “concede that the  
14 businesses are insolvent.” (Receivership Order, Ex. 8, at 2.) Momentum has also “agree[d] to the  
15 appointment of a receiver and generally do[es] not oppose” liquidating its vehicle inventory and many of  
16 its assets. (*Id.* at 3.) The various motions to appoint a receiver (including Momentum’s cross-complaint  
17 in the BMO Harris Case), resulting in the December 6, 2018 Receivership Order pursuant to Cal. Code  
18 Civ. Pro. §§ 564 *et seq.*, constitute a “filing of [a] petition by or against the franchisee under any ...  
19 receivership law.”

20 45. Momentum’s Protests make a number of vague allegations against FCA US, including  
21 unfair competition, breach of exclusivity, and improperly notifying customers that Momentum is no  
22 longer a CDJR dealer—a perplexing claim for franchisees that have ceased all dealership operations.  
23 Momentum provides no detail or support for these allegations, which appear to be identical to  
24 allegations in other protests filed by non-CDJR Momentum dealerships.<sup>1</sup>

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26 <sup>1</sup> Moreover, the Protests request that the Board enter “an order prohibiting FCA [US] . . . from  
27 making statements in derogation of [Momentum’s] status as an FCA [US] dealer . . .” In addition to  
28 raising First Amendment issues—by seeking what amounts to a gag order against FCA US (*see, e.g.,*  
*Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1241 (2000))—Momentum’s request seeks a remedy outside

1       46. But the Board does not need to be concerned with Momentum's unsubstantiated  
2 allegations regarding FCA US's conduct, as they have no bearing on the question of whether the  
3 Momentum franchises should be terminated as a general matter, and no relevance to any of the statutory  
4 good cause factors in particular. Rather, the uncontested facts satisfy each of the good cause factors as a  
5 matter of law.

6       47. Section 3061 sets forth seven non-exclusive factors to consider in evaluating whether  
7 good cause exists to terminate a franchise:

- 8           (a) Amount of business transacted by the franchisee, as compared to the  
9           business available to the franchisee.
- 10          (b) Investment necessarily made and obligations incurred by the  
11          franchisee to perform its part of the franchise.
- 12          (c) Permanency of the investment.
- 13          (d) Whether it is injurious or beneficial to the public welfare for the  
14          franchise to be modified or replaced or the business of the franchisee  
15          disrupted.
- 16          (e) Whether the franchisee has adequate motor vehicle sales and service  
17          facilities, equipment, vehicle parts, and qualified service personnel to  
18          reasonably provide for the needs of the consumers for the motor  
19          vehicles handled by the franchisee and has been and is rendering  
20          adequate services to the public.
- 21          (f) Whether the franchisee fails to fulfill the warranty obligations of the  
22          franchisor to be performed by the franchisee.
- 23          (g) Extent of franchisee's failure to comply with the terms of the  
24          franchise.

25 Cal. Veh. Code § 3061.

26       48. There is no dispute over the material facts that inform the "good cause" factors. These  
27 facts include, among other things, Momentum's cessation of business, its enormous debts, the  
28

this Board's jurisdiction. See Cal. Veh. Code § 3067(a) ("The [Board's] decision shall sustain,  
conditionally sustain, overrule, or conditionally overrule the protest."); *Hardin Oldsmobile v. New  
Motor Vehicle Bd.*, 52 Cal. App. 4th 585, 598 (1997), *as modified on denial of reh'g* (Feb. 28, 1997)  
(recognizing that "[t]he status of the litigants—a new motor vehicle and a vehicle manufacturer—does  
not confer jurisdiction on the Board over . . . claims not specifically committed to it" by the Legislature).

1 appointment of a receiver to manage many of Momentum's assets, and Momentum's consent to the  
2 receivership. Momentum's Protests contend only that good cause to terminate does not exist as a  
3 matter of law, and state unsubstantiated and irrelevant allegations against FCA US, as explained above.

4 49. With regard to the first "good cause" factor, because Momentum has no dealership  
5 operations, and indeed has surrendered possession of the Dealership Premises and many of its assets, it  
6 is necessarily failing to transact sufficient business compared to the amount available to it. (*See* Wong  
7 Decl., Ex. 3, at ¶¶ 39-40, 42; Wong Supp. Decl., Ex. 4, at ¶¶ 13-15; Receivership Order, Ex. 8, at 9-10.)

8 50. With regard to the second factor, Momentum's investments and obligations incurred with  
9 regard to the franchise have already been exhausted, as Momentum faces tens of millions of dollars in  
10 debts that it is unable to repay, and has agreed to the appointment of a receiver to pay off its creditors.  
11 (*See* Cross-Complaint, Ex. 11, at ¶ 20; BBVA Compass Complaint, Ex. 6; Receivership Order, Ex. 8, at  
12 3.)

13 51. With regard to the third factor, Momentum has no permanent investment in Vallejo or  
14 Fairfield, as its inventory and many of its assets are in receivership to satisfy its debts, which include a  
15 claim for over \$36 million by Momentum's floor plan lender. (*See* BBVA Compass Complaint, Ex.6.)

16 52. With regard to the fourth factor, as the Board recognized in *Porter* and *Roadtrek*, there  
17 can be no public interest in preserving a dealership that no longer exists. As Judge Skrocki explained in  
18 *Porter*:

19 The harm to the public from the loss of the dealership had already  
20 occurred prior to the notices of termination and the termination of the  
21 franchises will not cause any additional injury to the public welfare. In  
22 fact, the termination of the franchises may benefit the public as it will  
allow FCA [US] to replace the [closed] dealership with another franchise  
if it so desires.

23 Protest No. PR-2534-17, at ¶ 57.

24 53. With regard to the fifth factor, Momentum is not operating any CDJR sales and service  
25 facilities, has no personnel providing vehicle service, and has subjected its equipment, parts, and  
26 inventory to seizure and liquidation by its creditors. (*See* Wong Decl., Ex. 3, at ¶¶ 39-40; Wong Supp.  
27 Decl., Ex. 4, at ¶¶ 13-14; BMO Harris Complaint, Ex. 9; BBVA Compass Complaint, Ex. 6; Toyota  
28 Motor Credit Complaint, Ex. 10; Receivership Order, Ex. 8, at 6.)

1 54. With regard to the sixth factor, Momentum is not operating warranty facilities for CDJR  
2 vehicles, and indeed is not performing warranty work of any kind. (See Wong Decl., Ex. 3, at ¶¶ 15,  
3 16, 35, 37, 40; Wong Supp. Decl., Ex. 4, at ¶ 14.)

4 55. With regard to the final factor, Momentum is in material breach of the Dealer  
5 Agreements. There is no more fundamental breach of a motor vehicle sales and service franchise than  
6 the failure to conduct operations, to sell or service motor vehicles, or to promote the vehicle lines that  
7 the dealerships are supposed to represent. (See Wong Decl., Ex. 3, at ¶¶ 39-40, 42; Wong Supp. Decl.,  
8 Ex. 4, at ¶¶ 13-15.)

9 56. Based on the foregoing, it is indisputable that FCA US has good cause to terminate. The  
10 evidence offered by FCA US and attached to the Notices of Termination and this Motion demonstrates  
11 that Momentum Vallejo and Momentum Fairfield (1) have gone out of business, with neither the  
12 capacity nor the desire to reopen, and (2) are insolvent and subject to receivership. There is therefore  
13 no need for further hearings, costly discovery, and "wasteful expenditure of public funds." *Duarte*, 104  
14 Cal. App. 4th at 637. These Protests are untimely, moot, and entirely without legal or evidentiary  
15 support. They must therefore be dismissed.

16 WHEREFORE, FCA US requests the following relief:

- 17 1. An order dismissing with prejudice and refusing to hear the above-captioned Protests,  
18 because the Protests are untimely and moot, and because the uncontested evidence shows  
19 that FCA US has good cause to terminate the Dealer Agreements; and  
20 2. Such other and further relief as the Board deems proper.

21 Dated: January 11, 2019

22 DONAHUE DAVIES, LLP

23 By 

24 Robert E. Davies

25 Mary A. Stewart

26 BARACK, FERRAZZANO, KIRSCHBAUM &  
27 NAGELBERG, LLP

28 Roger H. Stetson

Jack O. Snyder, Jr.

David B. Lurie

Attorneys for Respondent, FCA US LLC

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**PROOF OF SERVICE**

CAPTION: VALLEJO CJD LLC and FAIRFIELD CJD, LP, Protestants  
v. FCA US LLC, Respondent

BOARD: NEW MOTOR VEHICLE BOARD

PROTEST NOS.: PR-2589-18, PR-2590-18, PR-2591-18, PR-2592-18, PR-2593-18, PR-2594-18,  
PR-2595-18, PR-2596-18.

I am employed in the City of Sacramento and County of Sacramento, State of California. I am over the age of 18 years and not a party to this action. My business address is P.O. Box 277010, Sacramento, California 95827-7010.

On **January 11, 2019**, I served the foregoing MOTION TO DISMISS PROTESTS OR, IN THE ALTERNATIVE, FOR A FINDING OF GOOD CAUSE TO TERMINATE BASED ON UNCONTESTED EVIDENCE on each party in this action, as follows:

(via email & priority mail)	(via email & personal service)
Halbert Rasmussen, Esq. Christian Scali, Esq. Gus N. Paras, Esq. Attorneys for Protestant Scali Rasmussen 800 Wilshire Boulevard, Suite 400 Los Angeles, CA 90017 Tel: (213) 239-5622 E-mail: <a href="mailto:cscali@scalilaw.com">cscali@scalilaw.com</a> E-mail: <a href="mailto:gparas@scalilaw.com">gparas@scalilaw.com</a>	New Motor Vehicle Board 1507 – 21 <sup>st</sup> Street, Suite 330 Sacramento, CA 95811 Email: <a href="mailto:nmvp@nmvpb.ca.gov">nmvp@nmvpb.ca.gov</a> Email: <a href="mailto:Robin.Parker@nmvpb.ca.gov">Robin.Parker@nmvpb.ca.gov</a> Email: <a href="mailto:Makalla.Turner@nmvpb.ca.gov">Makalla.Turner@nmvpb.ca.gov</a>

☒ (BY PRIORITY MAIL) I caused such envelope to be deposited in the United States Mail at Sacramento, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing documents for mailing. It is deposited with the United States postal service each day and that practice was followed in the ordinary course of business for the serve herein attested to.

☐ (BY FACSIMILE) The facsimile machine I used complied with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this Affidavit.

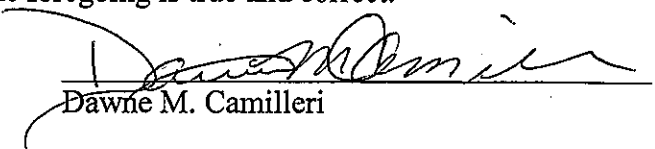
☒ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand.

☒ (BY E-MAIL) at the e-mail address listed above. Executed on **January 11, 2019**, at Sacramento, California.

PROOF OF SERVICE



1 I declare under penalty of perjury that the foregoing is true and correct.

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3 Dawne M. Camilleri  
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